IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 12TH DECEMBER 2006 / 21ST AGRAHAYANA 1928

CRP.No. 299 of 2006()

AGAINST THE ORDER IN EP.393/02 IN IA.1852/88. IN OS.307/1980 of I ADDL.SUB COURT, KOZHIKODE

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REVN. PETITIONER: (RESPONDENTS 1,3 & 6/DEFENDANTS 8,11 & 14):

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1. SUGATHAN, S/O.KOLLAMBALATH SANKARANKUTTY
   CHERUVANNUR AMSOM DESOM, KOZHIKODE TALUK.

2. KOLLAMBALATH MYTHRI,
   RESIDING AT KOLATHARA PARAMBA, A.V.S.U.P.SCHOOL,
   KOLATHARA.

3. KOLLAMBALATH SARASWATHI,
   W/O. SANKARANKUTTY, KOLATHARA, CHERUVANNUR AMSOM,
   DESOM, KOZHIKODE TALUK.

BY ADV. SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR

RESPONDENTS: PTNRS.1 & 2/DFNDTS.1 & 9 & RSPDTS.2,4 & 5):

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1. SEEMU, D/O. KOLLAMBALATH CHANDU,
   RESIDING AT KARUVALLY, OLAVANNA AMSOM AND DESOM,
   KOZHIKODE TALUK.

2. VIMALA BHAI TEACHER,
   D/O. KOLLAMBALATH SANKARANKUTTY, VALLIKUNNU AMSOM,
   DESOM, THIRURANGADI TALUK.

3. PRABHAVATHI, W/O. RAVI,
   RESIDING AT KOYYOLI, NEAR KANAKALAYA BANK,
   WEST HILL, KOZHIKODE.

4. KOLLAMBALATH PRASANNA,
   W/O. A.CHATHUKUTTY MASTER, AYILALATH HOUSE, KARAD,
   AZHINHILAM, ERNAD TALUK.

5. KOLLAMBALATH CHANDRALEKHA,
W/O. LATE SANKARANKUTTY, VALLIL HOUSE,
PERUNTHURUTHI, ELATHUR AMSOM, DESOM.

BY ADV. SRI.S.P.ARAVINDAKSHAN PILLAY
SMT.N.SANTHA
SRI.PETER JOSE CHRISTO

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 12/12/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO.1359 OF 2006 IN CRP 299/06

DISMISSED

12/12/2006

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

M.SASIDHARAN NAMBIAR,J.

C.R.P .NO. 299 OF 2006

Dated 12th December 2006

O R D E R

Petitioners are respondents 1, 3 and 6 in E.P.393/02 on the file of Sub court, Kozhikode. They are defendants 8, 11 and 14 in O.S.307/1980. Defendants 1 and 9 are petitioners in the E.P.393/02. They are respondents 1 and 2 herein. As per the preliminary decree modified by the Appellate court plaintiff was granted 1/8th share. First defendant was granted 1/8th share and defendants 2 to 7 together were granted 1/8th share and defendants 8 to 14 are 5/8th shares. This modified decree of appellate court was challenged before this court in S.A.341/1988. The second appeal was dismissed as settled out of court. Thereafter final decree was passed in I.A.1852/1988 allotting different shares to the respective sharers. Plaintiff and defendants 2 to 7 together to whom 1/8 shares each were allotted already obtained delivery of the sharers and allotted to them. Shares belonging to defendants 1 and 8 to 14

were kept together. Defendants 1 and 9 filed E.P.22/01 for delivery of the sharers allotted to defendants 1 and 8 to 14 for and on behalf of other defendants also. That E.P was originally dismissed for non prosecution. Later E.P.393/02 was filed for the same relief. Petitioners resisted the execution petition contending that as per release deed No.893/1980 of SRO Farook dated 25/3/1980, defendants 1 and 9 to 14 have released their rights in favour of 8th defendant and therefore respondents 1 and 2/defendants 1 and 9 herein are not entitled to get delivery sought for in E.P.393/02. As per order dated 17/11/2005 learned Sub Judge directed delivery of the property overruling the objections raised by petitioners. It is challenged in this revision petition filed under Section 115 of the Code of Civil Procedure.

2. Learned counsel appearing for petitioners and respondents 1 and 2 were heard.

3. Admittedly, the modified preliminary decree passed by the appellate court was challenged before this court and the second appeal was dismissed on the submission that matter was settled between the parties. Though learned Sub Judge in the impugned order found that final decree was passed on the basis

of a compromise decree, evidently the said finding was rendered without even perusing the final decree. Final decree shows that it was not a compromise decree. Instead commissioner was appointed and commissioner submitted report and plan. It was after hearing the parties and their counsel the final decree was passed. As per the final decree, plaintiff was allotted 1/8 shares. Defendants 2 to 7 as one group was allotted 1/8th share. It is admitted case that said shares were already taken delivery by them. Though 1/8 shares each of defendants 8 to 14 together with 1/8th share of first defendant were allotted as one group, delivery was not taken. Case of petitioners was that there was no necessity to seek delivery of the shares in view of the release deed executed by defendants 1 and 9 to 14 in favour of first defendant. According to petitioners under release deed No.893/1980 of SRO, Farook 8th defendant derived the shares of all others. Learned Sub Judge did not consider the question whether other sharers released their right in favour of 8th defendant as claimed by petitioners and if so, whether petitioners are entitled to seek delivery of the properties. As per the final decree, 1/8th share of first defendant was

not separately allotted and that share along with 5/8th shares of defendants 8 to 14 were allotted as a group. Learned Sub Judge has not considered the question whether respondents 1 and 2 are entitled to take delivery, from petitioners and defendants 10 to 13 the other sharers on behalf of all of them in the execution petition. That is a question which should have been decided by learned Sub Judge before ordinary delivery. So also question whether by the release deed set up by petitioners 8th defendant had obtained shares of defendants 1 and 9 to 14 should also be considered by the executing court before granting delivery. As these aspects were not considered by the Sub Judge the impugned order passed by the Sub Judge is set aside. E.P.393/02 is remitted back to the executing court for fresh disposal in accordance with law. Executing court is to consider whether defendants 1 and 9 to 14 have released their right in favour of 8th defendant and if so, whether respondents 1 and 2 are entitled to seek delivery of shares for and on behalf of other sharers.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.